



INSURANCE AND POLLUTION PREVENTION

Publication #99-349

Environmental Insurance

What is “environmental insurance” and what does it insure against?

Environmental insurance insures against potential damages and liabilities resulting from pollution which are excluded from conventional property and liability insurance. (For more on these “pollution exclusions,” see [*Standard Business Insurance, Publication #99-440.*](#))

Environmental insurance can be divided into property (first party) insurance and liability (third party) insurance. Of these, coverage for environmental liability - resulting from off-site pollution - has the larger market share.

What is the core coverage in environmental liability insurance?

Most environmental liability policies provide coverage for off-site bodily injury and property damage, off-site clean-up costs, and legal defense costs. Coverage extends to liabilities resulting from both gradual and sudden pollution. Coverage is site specific. On-site clean-up costs may be covered where there is a likelihood that the pollution would otherwise migrate off-site or contaminate groundwater which, likewise, would migrate off-site.

What additional coverages may be included in environmental liability insurance?

The insurance trade association has developed a model environmental liability policy. However, insurers provide a range of customized coverages in response to specific potential environmental liabilities.

Coverage under environmental liability insurance may be extended to personal injury. Personal injury, as distinct from “bodily injury,” describes damages resulting from invasion of privacy, trespass, and nuisance. Courts are divided on whether personal injury claims are covered by the absolute pollution exclusion in comprehensive general liability policies. Consequently, incorporation of coverage for personal injury in environmental liability policies is common but not universal.

What, specifically, are “environmental liabilities”?

Environmental liabilities arise from both on-site and off-site impacts of environmental pollution. The term “environmental pollution” includes far more than hazardous substances, as defined in the Washington state Waste Reduction Act. For example, molds and fungi which result in health problems are, for insurance purposes, an environmental pollutant.

It is necessary to distinguish between direct or primary liabilities and indirect or contingent liabilities. Direct liabilities result from the actions or failures to act of

a firm. A firm can also incur contingent liabilities as a consequence of an actions or failure to act of another, independent firm with which the firm in question has commercial relations.

Examples of direct environmental liabilities include:

- ✓ rupture of an underground tank containing university science lab wastes which resulted in contamination of private wells and groundwater. Damages and clean-up costs exceeded \$1.5 million.
- ✓ failure of hood filters in a chemistry laboratory which resulted in release of toxic fumes and required evacuation of a community. Costs exceeded \$215,000.
- ✓ release of carbon monoxide from faulty heating and ventilation systems which resulted in deaths and serious injuries. The property management corporation's commercial general liability insurance carrier declined coverage due to the absolute pollution exclusion.
- ✓ failure of an on-site wastewater treatment plant resulted in contamination of the publicly owned treatment works, forcing its closure. Cleanup and business losses totaled \$65,000.

What are examples of indirect environmental liabilities and how can such potential liabilities be insured?

Indirect environmental liabilities can be created through the purchase or acquisition of a contaminated site. A major portion of all environmental liability insurance is written to protect parties in real estate transactions against possible clean-up liabilities resulting from existing contamination of a property. Acquisition of the property need not be intended. For example, a lender may acquire property as a result of a loan foreclosure. In the event the property is discovered to be contaminated, the lender may be judged by a court to be liable for all clean-up costs.

Parties to a transaction often require the other parties to be insured against potential environmental liabilities. If pollution is discovered to have occurred in the past, the action will then be resolved by the parties with direct liability and will not transfer to the other parties to the transaction.

Issuance of property transaction liability insurance and the cost of coverage depend on assessments of the probability, potential severity of contamination, and past history of property ownership. One national study of commercial real estate transactions indicated that about 12% of such transactions involved contaminated property. Of these, 40% were not identified in site assessments prior to transfer. (The Toxic Cleanup Program at the Department of Ecology has prepared a very useful fact sheet regarding potential liabilities for clean-up of contaminated sites: "Hazardous Waste Considerations in Real Estate Transactions." To obtain a printed copy of this document, contact Jean Witt, Publications, Department of Ecology, 360-407-7472)

While property transfer liability insurance can help assure cleanup once problems are uncovered, it is of only indirect benefit in promoting pollution prevention and compliance.

In contrast to potential property liability arising from past pollution, property owners can also assume indirect environmental liability as a result of the actions of current tenants or lessees. Pollution prevention measures undertaken by property owners can reduce these potential liabilities. Several useful fact sheets to assist property owners and managers in identification and management of potential environmental pollutants have been prepared by the HWTR program at the Department of Ecology. (See Property Managers Problem Waste Fact Sheets, Publication Number 98-415 (a) - (n). To obtain a printed copy of these documents, contact Jean Witt, Publications, Department of Ecology, 360-407-7472)

What are examples of specialized environmental coverages?

Environmental insurance can be written for special sectors, e.g. for metal finishers or dry cleaners. It can also be written for specific pollution related liabilities.

For example, special coverages are available for:

- contractor's pollution liability
- environmental consultants professional liability
- contingent environmental coverage for financial institutions
- property transaction liability
- environmental remediation
- transportation pollution liability
- asbestos and lead abatement liability

What exclusions apply to environmental coverage?

Environmental coverages may contain several of the same exclusions which apply to comprehensive general liability policies, the exception being, of course, the pollution exclusion. The most significant of these exclusions include:

damage resulting from the insured's willful noncompliance with the law;

damage to property owned by the insured, i.e. the same "owned property" exclusion which applies to most comprehensive general liability policies;

bodily injury to any employee of the insured while working on the insured site;

liabilities for which coverage might exist under other policies, e.g. liabilities incurred in transportation.

As with comprehensive general liability insurance, exceptions exist to these typical exclusions. Some environmental liability coverages provide both first party protection, i.e. coverage of property owned by the insured, as well as coverage of third party or off-site liabilities. Other environmental liability policies include coverage for liabilities incurred in transportation of hazardous substances.

Is Environmental Insurance Coverage Required by Law?

Some states, including Washington, require insurance for underground storage tanks. California has proposed mandatory insurance for some hazardous materials but draft legislation has not been adopted.

Federal law requires liability insurance for transport of hazardous materials. .

As a protection against “joint and several liability” which applies under provisions of federal “Superfund” statute, individuals, firms, and other organizations may require environmental liability coverage by firms with whom they do business. One insurance “expert” recommends that all commercial landlords require all commercial tenants to carry environmental liability coverage as a condition of any lease. However, he cautions that even such coverage fails to protect the landlord against liabilities resulting from intentional illegal disposal of hazardous substances by tenants.

If you have questions or comments on this or other insurance fact sheets, please contact: Jerry Parker, Hazardous Waste and Toxic Reduction Program, Washington State Department of Ecology, 360-407-6750

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